Making markets work in the public interest

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Making markets work in the public interest: combating hazardous alcohol consumption through minimum pricing rules in Scotland

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Additional Information:	
Question	**Response**

Making markets work in the public interest: combating hazardous alcohol consumption through minimum pricing rules in Scotland

By Arianna Andreangeli•

1. Introduction

Striking an appropriate balance between the realisation of the internal market and the protection of public interest goals that are "best left" to the appreciation and action of the member states has been a central theme in the development of EU law and in particular of the interpretation of the rules on the free movement of goods. The constant push toward increasing market integration is especially visible in the very generous reading given to Article 34 of the Treaty on the Functioning of the European Union (TFEU). However, upholding this position has led to complex questions as to whether this approach may be applicable to all cases: should the existence of a "public interest justification" for these types of restraints always be sought in light of the framework for assessment provided in Article 36? Or should Article 34 be read more "sparingly" to reflect the need to safeguard the integrity of legitimate regulatory powers that the member states enjoy in areas identified by the TFEU?

The 2015 preliminary ruling concerning the legality, in light of the EU internal market rules, of the Scottish legislation imposing minimum prices calculated per unit of consumption of alcoholic beverages brings once again into sharp focus this tension. While the outcome of the preliminary reference procedure and of the domestic litigation is not surprising, this case points to a more general question, namely whether the nature of the internal market as a shared competence between the EU and the member states should play a role in how this provision is read, especially when the free movement rules are relied upon to challenge domestic regulatory measures in areas where, as with public health protection, the national authorities are competent to take action.

Starting from the example offered by the 2015 SWA preliminary ruling, this paper will examine the current approaches to price control rules and then critique them against the wider background of the principles governing, respectively, Union action in the field of internal market policy and member states' intervention directed at safeguarding high levels of public health. It will be argued that given the renewed commitment to respecting the principle of conferral, resulting from the Treaty of Lisbon, it may be time for a reassessment of the scope of Article 34 TFEU so that the member states can continue exercising the legitimate regulatory powers that they enjoy in this area, albeit within limits dictated by the demands of a well-functioning internal market. Having regard to national measures designed to address public health protection objectives, it will be suggested that since the member states retain significant latitude as regards deciding which measures are both "appropriate" and "necessary" to meet "local" health needs, it may have been more consistent with the principle of conferral and of subsidiarity to allow the domestic authorities to decide to "sacrifice" a degree of price competition in order to tackle complex public policy objectives linked to the survival of the local population.

Thereafter this article will explore a number of alternative interpretations of Article 34 that can help reflect the requirements enshrined in the principles governing the allocation of competences; in that context it will review examples emerging from the EU law acquis concerning the application of the internal market rules as well as the competition principles. It will be suggested that conferring a more "selective" scope of application to Article 34 could be both possible, in light of existing case

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law, and consistent with the nature of the internal market as an area of shared competence, whose exercise must always comply with the principle of conferral. It will be submitted that the experience of the Canadian federal Courts in dealing with questions of compatibility with federal competition law of restraints on the freedom to trade and to compete on grounds of prices imposed by Provincial legislation in the public interest could prove especially helpful, to the extent that it is predicated on the need to respect the remit of the powers that the Canadian constitutional principle recognises as belonging, respectively, to the federal Parliament and to the provincial lawmakers.

The paper will conclude that the Alcohol (Minimum Pricing) (Scotland) Act 2012 is a bold and at the same time controversial attempt to tackle a "local" public health emergency. Nonetheless, this enactment has exposed once again the tension between the Member States' "right to regulate" their economies for genuine public interest reasons and the EU's concern for maintaining the integrity of the internal market. As the Canadian experience has shown, however, the rules governing the distribution of powers at different levels of a multi-layered governance structure could provide a justification for adopting a more nuanced view of what represents a prohibited restraint of the freedom to trade and compete in a borderless, rivalrous market. While it is acknowledged that the concept of 'regulated conduct defence' cannot be fully transposed to EU free movement law, it is submitted that this notion provides a significant contribution to the debate on how the scope of Article 34 TFEU can be reshaped in a way that respects more closely the principle of conferral and, consequently, does not compromise the integrity of legitimate Member States' regulatory powers.

2. Tackling Scotland's alcohol malaise: a local problem in the wider EU single market — the SWA case and its implications

2.1. Free movement of goods and national price control rules "in the public interest" — a summary of a complex story

The limited remit of this contribution does not allow for a detailed analysis of CJEU's case law concerning the compatibility of price control rules with the free movement principles.[1] In general, it may be noted that the CJEU has acknowledged the competence of the member states to regulate certain economic activities in order to fulfil goals of public health protection,[2] so long as these measures were adopted by the competent national authorities acting in an "official capacity" and in areas in which the member states could act.[3] In this respect, the member states have been keen to continue regulating trade in goods for public interest reasons; however, this action has often encroached upon the freedom of movement principles.[4]

A number of CJEU's judgments have addressed these questions in respect of tobacco trade[5] and of alcohol sales: in the *Van Tiggele*[6] and *Groenveldt*[7] cases, among others, the Court of Justice held that generally applicable rules aimed at regimenting the sale of certain commodities did not have the effect of hindering, whether directly or indirectly, actually or potentially, the pattern of interstate trade.[8] Nonetheless, the Court has consistently taken the view that price control mechanisms, even when they were applicable without distinction to domestic and imported goods,

[1] See e.g., mutatis mutandis, Case C-148/15, Deutsche Parkinsons Vereingung, Opinion of AG Szpunar, 2 June 2016, not yet reported, para. 25; see also para. 32-33.
[2] See inter alia, e.g., case C-198/01, CIF, [2003] ECR I-8055.
[3] See inter alia case C-267/86, Van Eycke v ASPA, [1988] ECR 4769, para. 15, 17-19; see also CIF, cit. (fn. 2), para. 67-71.
[4] CIF, loc. ult. cit.
[5] See e.g. case C-13/77, GB-INNO v ATAB, [1977] ECR I-2215.
[6] Case 82/77, Van Tiggele, [1978] ECR 25.
[7] Case 15/79, Groenveldt, [1979] ECR 2049.
[8] Id., para. 13-14.

would infringe the EU Treaty if they resulted in imported goods being "(…) placed at a disadvantage in relation to identical domestic products either because they cannot profitably be marketed in the conditions laid down or because the competitive advantage conferred by lower cost prices is cancelled out."[9] Floor pricing rules were almost inevitably found to infringe Article 34 TFEU expressly because they prevent the affected goods, if imported, from being sold at substantially the same conditions as in the member state of origin.[10]

In light of the forgoing it is suggested that although the member states remain competent to regulate certain economic activities in the public interest, their discretion as to how to go about doing so is significantly limited by the reach of Article 34: [11] the cases mentioned earlier indicate that maintaining the integrity of price competition represents a "line in the sand" that the national authorities cannot cross without infringing the EU freedom of movement rules.[12] Consequently any national rule that impinges upon this form of competition, even though it aims to secure a genuine public interest objective, can only "survive" the consequences of this infringement if it can be shown that it "fits" within the requirements of Article 36 of the Treaty.[13]

It may be suggested, not without merit, that requiring the member states to provide this justification against the framework of principles of Article 36 is consistent with the function played by this provision in the Treaty: however, it can legitimately be queried whether adopting a very wide reading of Article 34 in all case may always be the appropriate solution to the question of how to reconcile EU-wide concerns for the pursuit of the internal market with the integrity of the member states' regulatory powers.[14] It has been acknowledged that scope of the free movement principles can be restricted not just upon complying with the conditions enshrined in Article 36, but also to fulfil those mandatory requirements that are best assessed and addressed by the national authorities.[15] More generally it should be noted that the TFEU itself recognises the existence of certain competence areas in respect of which the member states remain "sovereign" and therefore able to act with significant discretion, while the Union can only exercise very limited powers that are only aimed at avoiding impairing the good functioning of the internal market. [16]

Against this background it is legitimate to question the extent to which it should always be possible to rely on Article 34 for the purpose of condemning domestic measures that pursue genuine public interest objectives and restrict only "incidentally" and "potentially" the pattern of interstate trade and that affect policy areas in respect of which the TFEU allocates often significant discretion to the member states[17] without encroaching upon the nature of the internal market competence as a shared power between the Union and the member states. [18] It is suggested that these issues

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[9] Id., para. 14.

[10] Id., para. 18, 21; see also, mutatis mutandis, case 15/79, Groenveldt, [1979] ECR 2049, para. 5-7; case C-279/89, Commission v Belgium, [1991] ECR I-2233, para.21.

[11] See inter alia Commission v Belgium, cit. (fn. 17), para. 21. See also case 177-178/82, van den Haar and Kaveka, [1984] ECR 1797, para. 19-21.

[12] Case 82/77, Van Tiggele, [1977] ECR 25, para. 19, 21; see also mutatis mutandis, Groenveldt, cit. (fn. 6), para. 7; case 243/83, SA Binon, [1985] ECR 2015, para. 43-44.

[13] See inter alia Oliver, "When if ever can restrictions on free movement be justified on economic grounds?", (2016) 41(2) ELRev 147, especially pp. 149, 154-155.

[14] See e.g. Gormley, "Free movement of goods within the EU: some issues and an Irish perspective", (2011) 46 Irish Jurist 74, especially pp. 84-86.

[15] See e.g. case 145/88, Torfaen BC v B&Q plc, [1989] ECR 3851, especially para. 12-13, 17; case C-110/05, Commission v Italy ('trailers'), [2009] ECR I-519, see e.g. para. 59; case C-368/95, Vereinigte Familiapress v Bauer, [1997] ECR I-3689, para. 18. For commentary, see e.g. Oliver, "Of trailers and jet-skis", (2009-2010) 33 Fordham Int'l L J 1423, see e.g. pp. 1448-1451.

[16] See e.g., mutatis mutandis, case C-157/99, Geraets-Smits et al., [2001] ECR I-5473, para. 44-45.

[17] See e.g. case C-145/88, Torfaen BC v B&Q plc, [1989] ECR I-593, para. 10-11.

[18] See inter alia, more recently, Bartlett, "The EU's competence gap in public health and non-communicable diseases' policy", (2016) 5(1) CJICL 50, especially pp. 54-55; also, mutatis mutandis, Andreangeli, "Healthcare

emerge very clearly from the proceedings brought against the 2012 Scottish minimum alcohol pricing legislation. To the extent that the 2012 Act pursued public health protection objectives on the basis of the identification of "typically Scottish" demands of protection, this case can be considered as a very keen example of the tension existing between the reach of the internal market and the integrity of those regulatory powers that the national authorities retain. The next sections will address these questions, starting from the analysis of the SWA preliminary ruling.

2.2. Preserving price competition at the expense of "the health of the nation"? The SWA case

The previous section outlined the approach adopted by the EU Court of Justice when assessing the compliance of prima facie generally applicable restraints on the freedom to trade in light of the free movement rules and queried whether giving precedent to price competition in all cases, on the ground of its being decisive for market integration, could significantly curtail the integrity of the member states' regulatory powers that the rules on competence, contained in the Treaty, confer to them. The purpose of this section is to consider whether these concerns are justified, by focusing on the 2015 preliminary ruling relating to the legality of the 2012 Scottish minimum alcohol pricing legislation.

The Alcohol (Minimum Pricing) (Scotland) Act 2012 was enacted to address the health, social and economic harm arising from hazardous alcohol consumption in Scotland and was consequently adopted by the Scottish Parliament as an expression of its devolved powers in the field of public health protection.[19] By aiming to reduce demand for less expensive alcoholic beverages, especially when sold outside licensed premises, the 2012 Act sought to reduce demand among the more disadvantaged sections of the population,[20] where consumption of high-strength, low-price alcohol was most frequent. [21] The Act was however challenged,[22] on the ground of it being allegedly incompatible with the EU internal market rules.[23]

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services, the EU single market and beyond: Meeting local needs in an open economy—how much market or how little market?", (2016) 43 Legal Issues of Economic Integration 145, especially pp. 160-161.

[19] See, for a summary: https://www.shef.ac.uk/scharr/sections/ph/research/alpol/faq#difference; for commentary, see e.g. Ludbroke et al., "Tackling alcohol misuse", (2010) 12(1) Applied Health Econ & Health Policy 51.

[20] See the University of Sheffield's Alcohol Policy Group study generally (available at: https://www.shef.ac.uk/scharr/sections/ph/research/alpol/research/sapm in its various iterations) and in particular the model for Scotland: http://www.shef.ac.uk/scharr/sections/ph/research/alpol/research/completed/scotland (hereinafter referred to as 'the Sheffield Study'). See also, inter alia WHO, Global Status Report on Alcohol and Health (2014), available at: http://www.who.int/substance_abuse/publications/global_alcohol_report/en/ for a full list of harmful outcomes associated with alcohol consumption. See also: http://www.scotpho.org.uk/behaviour/alcohol/data/availability-affordability-and-consumption; for more general World Health Organisation data, see: : http://www.who.int/substance_abuse/publications/global_alcohol_report/en/.

[21] Ibid; see also Sheron et al., "Impact on minimum price per unit of alcohol on patients with liver disease in the UK" (2014) 14(4) Clin Medicine 396, see e.g. pp. 399-400.

[22] Petition for judicial review by Scotch Whisky Association and others v Scottish Ministers, Inner House, per Lord Doherty, 3 May 2013. For a summary of the grounds and of the Opinion, see: http://www.scotland-judiciary.org.uk/9/1040/Petition-for-Judicial-Review-by-Scotch-Whisky-Association-And-Others.

[23] Petition for judicial review by Scotch Whisky Association and others v Scottish Ministers, Inner House, per Lord Doherty, 3 May 2013. For a summary of the grounds and of the Opinion, see: http://www.scotland-judiciary.org.uk/9/1040/Petition-for-Judicial-Review-by-Scotch-Whisky-Association-And-Others. See inter alia the position of the thinktank, the Adam Smith Institute, at: http://www.adamsmith.org/blog/healthcare/six-reasons-to-reject-minimum-alcohol-pricing. Also see the initial statement of the SWA, available at: http://www.scotch-whisky.org.uk/news-publications/news/scotch-whisky-industry-challenges-minimum-pricing-of-alcohol/#.Vyoq38v2Zdg.b

Rejecting the challenge, Lord Docherty, speaking for the Outer House, had held that the 2012 Act did not contravene EU law. Having regard to the plea that the Act had breached the existing Common Market Organisation (CMO) Regulation[24] governing the trade of wine, it was stated that this Regulation did not prejudice the power of the Member States to rely on, inter alia, pricing rules with a view regulating wine sales within their respective territories, albeit within the constraints arising from the observance of the internal market principles.[25] As to the other plea that the minimum pricing rules were incompatible with the free movement of goods' principles, Lord Docherty accepted, in line with the acquis, that in principle setting floor prices was incompatible with Article 34 TFEU. Nonetheless, he took the view that such a restriction could be justified in light of Article 36 of the Treaty on the ground that it had been both "appropriate" and "necessary" for the attainment of a legitimate public interest aim, namely the safeguard of the "health and life of humans".[26]

Unsurprisingly, the petitioner challenged the Outer House decision and, on appeal, the Inner House decided, in the event, to suspend proceedings and make a reference to the EU Court of Justice.[27] The Luxembourg Court rejected the plea concerning the alleged infringement of the CMO Regulation, on the ground that the latter did not prevent member states to adopt measures designing the conditions according to which wine should have been sold,[28] including those affecting pricing, albeit within limits of 'appropriateness' and 'necessity' vis-à-vis the attainment of a recognised public interest goal.[29] Coming to the central issue of the compatibility of the minimum pricing rules with Articles 34 and 36 TFEU,[30] the Court confirmed that since minimum pricing rules prevented "the lower cost price of imported products being reflected in the selling price to the consumer" they did not allow importers to market their goods in Scottish markets at the same conditions available to them in their country of origin[31] and thus infringed Article 34.[32]

The Court examined whether the 2012 Act could be justified in light of Article 36 of the Treaty, on the ground of being "appropriate" and "necessary" vis-à-vis securing the protection of public health.[33] It was acknowledged that the Member States, in accordance with Articles 5 and 168 TFEU, were entitled to determine the standards of protection of public health that were suitable to the needs of their population and that, in that context, could also identify the policy tools that they regarded as most appropriate to secure these objectives.[34] It was further observed that the 2012 minimum pricing rules, being part of a "consistent and systematic" attempt at reducing the harmful consumption of cheap, higher strength alcohol, thereby limiting the social and health harm arising from demands for these commodities,[35] could be regarded as an appropriate policy tool to improving public health.[36]

Thereafter, the Court considered the "necessity" of the minimum pricing rules, i.e. the question of whether any "less restrictive" alternative existed that could have secured the same level of public health benefits for the Scottish population. The CJEU recognised that member states could introduce generally applicable measures designed to increase the retail price of alcoholic drinks and thereby

[24] Regulation of the European Parliament and the Council No 1308/2013, [2013] OJ L347.
[25] Id., para. 90-96.
[26] Id., para. 53-60; see also para. 74-80.
[27] Case C-333/14, Scotch Whisky Association v Scottish Ministers, judgment of 23 December 2015, not yet reported, hereinafter referred to also as 'the SWA case'.
[28] Id., para. 19-20.
[29] Id., para. 24-26; see also para. 28-29.
[30] Id., para. 34; see also para. 51 of AG Opinion.
[31] Para. 31-32 of the judgment. See also AG Opinion, para. 58.
[32] Id., para. 31-33; see also para. 58-59 and 64 of the AG Opinion.
[33] Id., para. 35.
[34] Id., para. 37-38.
[35] Id., para. 36-37.
[36] Id., para. 34.

secure important public interest goals[37] and observed that tax increases could be regarded as having a similar impact on prices vis-a-vis imposing floor prices, thereby leading to a loss in demand for the affected goods.[38] The Court compared the minimum pricing rules with a hypothetical tax increase on alcohol sale prices and stated that to the extent that the latter was generally applicable and did not affect the freedom of individual traders to set prices, it represented a far less restrictive policy instrument aimed at reducing alcohol demand[39] without posing any "serious obstacle to access to the UK (and in particular to the Scottish market for the sale of alcoholic beverages.[40] Consequently, the Court took the view that the minimum pricing rules would have been "more effective" than a generalised tax hike in reducing alcohol related harm by limiting demand.

The Court of Justice acknowledged that the 2012 minimum pricing rules could lead to a reduction not only of the "hazardous consumption" of alcohol but also of alcohol demand among the population as a whole.[41] Thus, it was held that the impact of the minimum pricing rules on the population as a whole and in particular on "moderate drinkers" should not have been read as evidence of lesser effectiveness of the 2012 Act, but to the contrary should have been assessed as part of the over-arching appraisal of the ability of the enactment to reducing alcohol consumption and therefore alcohol related harm across the whole of Scottish society.[42] For this purpose, the referring judge should have examined all evidence available on the day of the ruling[43] "objectively" and "carefully", albeit without requiring the Scottish Government to prove its case "with absolute certainty".[44]

After resuming proceedings in 2016, the Scottish Court of Session reached a decision on the merits of the appeal brought against the Outer House judgment.[45] Lord Carloway, speaking for the Inner House, found no error in the decision under appeal. Having regard especially to the application of Article 36 TFEU to the case at hand and in that context to the "appropriateness" of the measure vis-à-vis its chosen public policy goals, it was held that the Scottish Government enjoyed, in light of Article 168 TFEU, significant discretion in assessing how to respond to the public health needs of the Scottish population and consequently could have legitimately taken the view that imposing floor prices would have been a well-suited response to these demands.[46] In this context, the protection of the more disadvantaged strata of the population could have been given priority over "shielding" more affluent consumers from the inevitable consequences of any price increases.[47]

As to the proportionality of the measure, Lord Carloway made clear that the appellate judge should have confined his cognisance to "comparing the effectiveness of minimum pricing in achieving the targeted objectives with other measures" that could both potentially achieve the same goals and affect the flow of interstate trade to a lesser extent[48] in light of all evidence before it and without demanding that the Government prove its case with absolute certainty.[49] Thereafter the Court compared the effectiveness, in terms of demand reduction, of imposing floor prices vis-à-vis increasing indirect taxation on alcoholic beverages: in its view, while both policy tools affected prices and, as a result, would "sooner or later" impact on demand, only minimum pricing could have attained the twofold goal of determining a drop in consumption for cheap and widely available

[37] Id., para. 43.
[38] Id., para. 44.
[39] Id., para. 45-46.
[40] Id., para. 46.
[41] Ibid.
[42] Id., para. 49-50.
[43] Id., para. 62-63.
[44] Id., para. 55-57.
[45] The Scotch Whisky Association v Lord Advocate, judgment of 21 October 2016, [2016] CSIH 77, available at: http://www.scotcourts.gov.uk/search-judgments/judgment?id=9a1821a7-8980-69d2-b500-ff0000d74aa7.
[46] Id., para. 168-170.
[47] Id., para. 173; see also para. 177-180.
[48] Id., para. 185-186.
[49] Id., para. 188-189.

alcohol, to the benefit of society as a whole, and reducing demand among the "target group", namely the most disadvantaged consumers.[50] It was observed that unlike with minimum pricing, the greater burden resulting from heaver alcohol taxation could have been "minimised" through acti0n on the part of retailers, who could have chosen not to "pass on" the overcharge resulting from the hike in taxation through higher retail prices.[51]

Thus, taking into account the complexities of the pricing strategies usually adopted by alcohol sellers—especially by supermarkets—Lord Carloway held that the impact of greater fiscal imposition on demand would have been too remote and uncertain in practice for it to be effective at reducing demand.[52] Finally, the judgment considered to what extent the 2012 Act would have impacted on the interstate trade flows: it was acknowledged that producers of certain imported drinks (such as "Bulgarian wines") could have been forced to set higher prices in Scotland compared with those charged elsewhere within the EU. Nonetheless, he took the view that due to the small size of demand in Scotland for this type of foreign drinks, compared with the UK and also with the Union at large, this effects were likely to be "minor".[53]

While the limited remit of this contribution does not allow for an in-depth analysis of the Court of Session's appeal judgment, a few observations may be made. It is suggested that the SWA preliminary ruling could have been read as a telling example of the scepticism with which the CJEU had dealt with similar arguments thus far.[54] By contrast, it is argued that the Inner House's decision represents a restatement of both the need to preserve the integrity of national regulatory prerogatives in areas where the member states enjoy wide margins of appreciation, in accordance with the Treaty's competence rules: it is suggested that the fact that the appellate judge adopted a standard of review that was "objective" and acknowledged that the Government was not under an obligation to prove its case with "absolute certainty" appeared consistent with the nature and intensity of the powers that each member state enjoys in respect of addressing demands of public health protection, according to Article 168 TFEU.[55]

It can certainly be agreed with Lord Carloway that the SWA case has once again "thrown into sharp focus a measure, which a Government deems to be one which will serve to improve the nations' health, with the commercial interests of the producers and sellers of alcohol", whose right to sell their commodities freely across the single market is protected by Article 34 TFEU.[56] In this context, Article 36 TFEU has once again provided the framework within which the member states can articulate a public policy justification for regulatory measures hindering—at least potentially—the pattern of trade among member states.[57] Nonetheless, it is submitted that the breadth with which Article 34 is read may be at odds with other important rules, i.e. those governing the allocation of powers at national and at EU level.[58]

It is reminded that with the Treaty of Lisbon the principles of conferral and subsidiarity have been confirmed as two central tenets within the overarching structure of the EU Treaties.[59] Thus, it is argued that to the extent that the judicial application of Article 34 falls within the exercise, on the part of the Union, of its internal market competence, which is a power shared with the member

[50] Id., para. 199-200.
[51] Ibid.
[52] Ibid.
[53] Id., para. 202-203.
[54] See e.g. SWA, para. 43-46.
[55] See case C-333/14, cit. (fn. 29), para.38-41. For commentary, see e.g. Oliver, "Of trailers and jet skis", (2009-10) 33 Fordham Int'l L J 1423, p. 1449-1451; also Gormley, "Inconsistencies and misconceptions in the free movement of goods", (2015) 40(6) ELRev 925, pp. 929-931.
[56] Inner House, Court of Session, cit. (fn. 50), per Lord Carloway, para. 8.
[57] See e.g. Oliver, cit. (fn. 61), pp. 1450-1451.
[58] See id., pp. 1423, 1469-1470.
[59] See inter alia Horsley, "Unearthing buried treasure", (2012) ELRev 734, pp. 733-735; see also Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States" (1994) 94 Columbia Law Rev. 331, pp. 393-394.

states, the way in which this rule is interpreted should be influenced by and comply with the requirements of the principle of conferral,[60] for it is only by doing so that the question of whether the EU's "integrationist imperative" cam be achieved without compromising the integrity of the member states' regulatory prerogatives, in light of the TFEU itself can be addressed.[61] But how can this "alternative take" on the freedom of movement rules be framed? The next sections will explore these broader issues having regard more closely to the complex interaction between the implementation of the internal market goals and the member states' exercise of their powers in the field of public health protection.

3. Between national public health demands and the pursuit of open, competitive markets: "restructuring Article 34 TFEU?"

3.1. Price competition, non-discrimination and the public interest: who wins? Seeking to attain local public health demands in the internal market as a "shared regulatory space"

The previous sections sketched the approach adopted by the CJEU in respect of the review of domestic price control rules in light of the free movement principles and thereafter examined its application in the context of the litigation concerning the Scottish minimum alcohol pricing legislation. In light of this analysis it was questioned whether giving precedence to price competition as a means of achieving market access could be appropriate in all cases, especially when the prima facie restrictions on the free movement of goods stemmed from measures adopted by the member states in areas belonging to their competences, in light of the Treaty itself.

This section will examine how such a complex interplay between the EU's focus on market integration, on the one hand, and the member states' concern for continuing to exercise their regulatory powers in areas assigned to them by the EU Treaties can be negotiated. It is well-known that CJEU had already had the opportunity to deal with concerns for the "creeping" expansion of the scope of Article 34 that had been raised in several cases where the EU's "market integration mission" had been considered to encroach upon the member states' ability to pursue legitimate public interest goals.[62] While certain decisions were hailed as providing a more "balanced" answer to this question, other, comparatively more numerous judgments indicated how the Court of Justice had applied this "more selective" view of Article 34 rather reluctantly.[63] Accordingly, it can legitimately be doubted whether the current, dominant interpretation of the free movement of goods' principle can actually respond to the demands of the principle of conferral,[64] since it does not appear to consider either the shared nature of the internal market competence or the demands the integrity of the member states' regulatory powers.[65]

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[60] See Horsley, cit. (fn. 65), p. 734-735.

[61] Horsley, cit. (fn. 65), pp. 752-753; see also mutatis mutandis, MacCulloch, "Scottish Minimum alcohol pricing and EU law", (2014), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2394018, pp. 12-14.

[62] See e.g. cases 60 and 61/84, Cinetheque SA and others, [1985] ECR 329; C-267/91, Keck, [1993] ECR I-905; C-145/88, Torfaen BC v B&Q plc, [1989] ECR I-593; C-142/05, Mickelsson and Roos, [2009] ECR I-4273. For commentary see e.g. Horsley, cit. (fn. 61), pp. 751 ff.; also Yeo, "Discrimination or market access? Re-evaluating the EU's organisation of the internal market", (2008) 4(2) CSLRev 315, pp. 321-322.

[63] See inter alia case C-441/04, A-Punkt Schmuckhandels GmbH v Claudia Schmidt, [2006] ECR I-2209, para. 17-21, see also para. 9; also case C-142/05, Mickelsson and Roos, [2009] ECR I-4273, e.g. para. 24, 27-28; case C-110/05, [2009] ECR I-519; for commentary, see e.g. Yeo, cit. (fn. 77), p. 322. More recently, see, mutatis mutandis, case C-531/07, Fachverband der Buch v LIBRO, [2009] ECR I-276, para. 17; see also para. 22-23. For commentary, see Spaventa, "Leaving Keck behind?", (2009) 34(6) ELRev 914, p. 917, 924.

[64] See inter alia Horsley, cit. (fn. 65), pp. 936-937; also Spaventa, cit. (fn. 70), pp. 922-923; see also, mutatis mutandis, e.g. C-372/04, Watts, [2006] ECR I-325, para. 105-106; see also para. 92; more recently, mutatis mutandis, case C-531/07, Fachverband der Buch v LIBRO, [2009] ECR I-276, para. 17.

[65] See Horsley, loc. ult. cit.

But how can an alternative take on Article 34 be construed? And in which case may it be necessary to adopt it? It is observed that the latter question strikes at the core of the interplay between the internal market competence which, as stated earlier, is shared between the Union and the member states, and the integrity of those powers that the Treaty leaves to the national authorities. It is clear that Article 5 TFEU draws a clear distinction between joint competences, in respect of which the Union can take action subject to the principle of subsidiarity, and "coordinating" and "supporting" competences, in respect of which the EU can only take very limited action and solely for the purpose of securing the good functioning of the internal market. [66]

Against this background, it is argued that if the internal market is to remain a "shared regulatory space" where the EU and the member states can act each in the respective areas of competence, the shape of Article 34, which represents one of the "tools" through which the goal of market integration can be achieved, cannot and should not be stretched as far as to impinge upon the integrity of other powers that the TFEU may have conferred to the member states. [67] It is suggested that the pursuit of high standards of public health protection represents a good example of a policy area where the member states enjoy a wide margin of appreciation and in respect of which the Union, instead, can only act for the purpose of "supporting, coordinating and complementing" their action, so as to protect the efficiency of the internal market.

The limited remit of this contribution does not permit any in-depth consideration of the relationship between the free movement rules and the concerns for maintaining high levels of public health protection in each member state. Suffice to say that, on the one hand, according to Articles 5 and 168 TFEU it is primarily for the member states to determine the needs of their populations and to decide how to address the health demands of the local populations. On the other hand, it has been accepted that medical services, even when they are supplied by public bodies and financed by general taxation, are subject to the free movement principles. [68] It is however clear that these services are of "sensitive nature". [69] Consequently, absent common rules governing their provision, the member states' authorities should be recognised the power to assess the needs of public health within their respective jurisdiction and, consequently, should be free to determine the entitlement to services, the ways in which to supply these service and how to finance them, [70] to maintain good standards of public health and protect the financial stability, the continuity and the consistency of care. [71]

However, the CJEU has expressly stated that the exercise of the national competences in this area could not occur at the expenses of the good functioning the internal market. Consequently, any national requirements governing the provision of these services in cross-border circumstances must be both "appropriate" and "necessary", be inspired by objective and non-discriminatory criteria and applied in a non-arbitrary way. [72] The EU, on its part, can only adopt those measures that ensure mutual coordination between national authorities so that the exercise of those discretionary powers does not unduly hinder the free movement of services [73] and accordingly, only

[66] See inter alia, mutatis mutandis, Andreangeli, "Healthcare services, the EU single market and beyond", (2016) 43(2) LIEI 145, pp. 150-152.

[67] See inter alia, Horsley, cit. (fn. 65), pp. 751-752; also mutatis mutandis, Spaventa, cit. (fn. 70), pp. 921-923.

[68] See e.g., mutatis mutandis, case 159/90, SPUC v Grogan, [1991] ECR I-4685, para. 18.

[69] See e.g. Declaration of the Contracting Parties on Article 168(4) TFEU, attached to the TFEU and agreed at the Lisbon Inter-Governmental Conference. For commentary, see inter alia Prosser, The Limits of Competition Law, 2005: Oxford, OUP, p. 7; see also p. 9.

[70] Cases 286/82 and 26/83, Luisi and Carbone v Ministero del Tesoro, [1984] ECR 377, para. 16. See also case C-156/98, Kohll, [1998] ECR I-1931, para. 20.

[71] Ibid.

[72] See e.g. Watts, cit. (fn. 135), para. 86-92. See also case C-156/98, Kohll, [1998] ECR I-1931, para. 73-74, 87-89.

[73] See e.g. case C-157/99, Geraets-Smits et al., [2001] ECR I-5473, para. 44-45; see also, e.g. Directive of the European Parliament and the Council of 9 March 2011No 24 on the application of patients' rights in cross-border healthcare, [2011] OJ L88/45, Preamble, Recital 10-11.

enjoys the power to "coordinate, complement and support" the action of the member states in this area.[74] Subject to an assessment of whether any limitations placed on the freedom of movement of these services are "inherent" to the attainment of public policy goals, in the sense of being "appropriate" and "strictly proportionate" to their achievement, the relevant domestic rules were regarding as falling outside the remit of the internal market principles.[75]

Against this background, it is legitimate to query whether, if the nature of the powers enjoyed by the national authorities in this field was taken into account in the scrutiny of a measure akin to the Scottish minimum alcohol pricing laws, the CJEU could have decided the case in a different way and, if this had been the case, how this "conferral-influenced" approach could have been framed. Having regard to the specific question of the legality, in light of the EU internal market principles, of the 2012 Act, it is acknowledged that unlike the domestic rules relating to the organisation and provision of healthcare services, the Scottish minimum unit pricing legislation pursue a more general aim, namely safeguarding "the health of the nation". It is also recognised that the minimum alcohol pricing rules affect directly an essential aspect of rivalry within the internal market. Nonetheless, it is suggested that the adoption of the 2012 legislation entailed a similar assessment of the health demands of the Scottish population, with a view to designing the measures that are regarded as appropriate to address these needs.

It is therefore argued that, since in enacting the minimum alcohol pricing rules the Scottish Parliament was acting within the scope of its public health protection competence, the scope of Article 34 TFEU, in as much as it is applicable to the 2012 Act, should be restricted in a way that reflects the nature of the powers exercised by the member states and in that context protects the margin of appreciation that they enjoy in this area.[76] It is suggested that the renewed commitment to observing the principle of conferral as a means of ensuring the legality of EU action and thereby maintain the integrity of the powers enjoyed by the member states in specific policy areas—such as public health protection—could have provided a powerful justification for seeking to exclude the 2012 Act from the remit of Article 34 TFEU: subject to an assessment of whether any "incidental impact" on the pattern of interstate trade had restricted the flow of imports more than it was strictly necessary to attain these objectives, the minimum alcohol pricing rules could have been regarded as falling outside the scope of Article 34, on the ground of being "appropriate" to fulfilling the public interest demands they had sought to address.[77]

It is further observed that an interesting parallel can be drawn between the approach proposed above and the framework for the assessment of certain restrictions on the freedom of movement of goods provided by the CJEU in its *Torfaen* judgment, namely the "Mandatory Requirements" doctrine. As is well known, in that decision the Court of Justice had been able to exclude from the scope of Article 34 TFEU those national measures that aimed to address genuine public policy concerns arising from the "economic and socio cultural characteristics" of local population and conformed to criteria of "inherency", i.e. to conditions of "strict necessity" and of "suitability" of the objective that they pursued.[78] This approach may usefully be compared with the CJEU's appraisal of the 2012 Act,: it is clear that the Scottish minimum alcohol pricing rules were regarded as providing a "coherent and rational response" to public policy demands that were typical

[74] See e.g. case C-385/99, Muller-Faure', [2003] ECR I-270;C-157/99, Geraets-Smits et al., [2001] ECR I-5473; case T-319/99, FENIN v Commission, [2003], ECR II-357, para. 35, 38-40; also, inter alia, Sauter, "The impact of EU Competition law on national healthcare services", (2013) 28(4) ELRev 457 at 463-465.

[75] See inter alia, C-385/99, cit. (fn. 116), para. 71-75; see also Prosser, cit. (fn. 111), pp. 7-9.

[76] See Horsley, cit. (fn. 105), pp. 752-753.

[77] Id., p. 753. See also, mutatis mutandis, inter alia case C-376/98, Germany v European Parliament and Council, [2000] ECR I-8419, para. 103-105; also, Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States" (1994) 94 Columbia Law Rev. 331, pp. 399-400; Andreangeli, "Healthcare services, the EU single market and beyond", (2016) 43(2) LIEI 145, pp. 150-152.

[78] Horsley, cit. (fn. 105), p. 753; see also, mutatis mutandis, inter alia case C-376/98, Germany v European Parliament and Council, [2000] ECR I-8419, para. 103-105; also, Bermann, cit. (fn. 100), pp. 399-400.

of the Scottish population and that the Scottish Parliament was competent to assess and on that basis to decide how to respond to, in accordance with Article 168 TFEU.[79]

Accordingly, it could be argued that the CJEU could have assessed whether any restrictions on the freedom of movement that this legislation entailed were "intrinsic" to the achievement of the beneficial effects pursued by the national authorities in light of Article 34 TFEU, in accordance with the above pattern of analysis.[80] It is submitted that the Court of Justice might have engaged with two questions: first of all, it could have examined the nature of the competence that the member states have exercised, the margin of discretion that they enjoy, in light of the Treaty and the corresponding issue of whether the Union enjoyed any power to act in the same area. In this specific context, it would have been necessary also to consider whether any Union's competence is shared or merely "supporting" or "coordinating".[81] And second, the Court could have analysed the purpose and content of the measure so as to decide whether the latter was "genuinely regulatory" in nature: if the measure in issue was "appropriate" to securing goals for which the member states remain competent to take action and did not affect the effectiveness of the free movement rules more than what was strictly necessary to secure its goals, it should fall outside the scope of Article 34 TFEU.[82]

It is therefore argued that thanks to a scrupulous assessment of the 'appropriateness' and of the 'inherency' of the measure at issue in each case the scope of Article 34 could therefore be "redesigned" to reflect more accurately the allocation of competences at EU and at national level in this area.[83] It should, however, be noted that, as was suggested by certain commentators, extending any approach akin to the "Mandatory Requirements" doctrine to domestic price control rules may not be entirely apposite. It was argued in this respect that to the extent that rules of this kind would prevent traders to compete in a specific member states "as if they were at home" in all respects and especially in respect of pricing, they would almost inevitably be contrary to the principle of non-discrimination and therefore could only be justified in light of the framework for assessment enshrined in Article 36 TFEU.[84] It is acknowledged that this principle is central to the internal market and cannot be derogated unless when this is expressly allowed under the TFEU: however, it is argued that the equally fundamental nature of the principle of conferral could support the adoption of the more "selective" reading of Article 34 suggested above even in cases concerning the legality of pricing rules, so long as it can be established that similar enactments represent a "genuine" attempt to regulate a specific market to address genuine public health needs and have therefore "nothing to do with regulating imports".[85]

In light of the forgoing it is concluded that for the nature of its subject-matter the SWA case not only provided a telling example of the tension existing between the pursuit of the internal market goals and the need to maintain the integrity of the member states' powers to regulate certain sectors of their economy in the public interest. It also offered an opportunity to consider whether, in light of the emphasis placed by the Treaty of Lisbon on the principle of conferral, the latter could have in any way influenced the interpretation of Article 34 TFEU.[86] It is however clear that the "Mandatory Requirements" doctrine is not the only "source of inspiration" for constructing an alternative approach to the established interpretation of Article 34: the next section will briefly analyse how EU competition law has dealt with the similar question of how prima facie competing

[79] Case C-376/98, loc. ult. cit.; see also case C-333/14, para. 35-38.
[80] See Case C-376/98, loc. ult. cit.; see also case C-333/14, para. 35-38. For commentary, see inter alia, Horsley, loc. ult. cit.; also mutatis mutandis, Snell, cit. (fn. 78), pp. 439-440.
[81] See inter alia, mutatis mutandis, Andreangeli, "Healthcare services, the EU single market and beyond", (2016) 43(2) LIEI 145, pp. 150-152.
[82] See e.g. Horsley, cit. (fn. 82), pp. 752-753.
[83] Id., p. 754; see also Spaventa, cit. (fn. 70), p. 937.
[84] See inter alia Oliver, cit. (fn. 61), pp. 1441-1442.
[85] See, mutatis mutandis, case C-145/88, cit. (fn. 73), para. 14-15; see also Horsley, cit. (fn. 65), p. 753-754.
[86] Case C-333/14, cit., para. 37-38.

concerns for safeguarding, on the one hand, effective competition and, on the other hand, introducing an enforcing economic regulation at national level can be reciprocally counterbalanced.

3.2. Looking for a 'conferral-influenced' reading of Article 34 TFEU: borrowing from EU Competition law?

The previous section provided a brief critique of the approach adopted by the CJEU vis-à-vis the review of the Scottish minimum alcohol pricing legislation in light of the Court's acquis concerning the complex interplay existing between the realisation of the internal market and the achievement of public health protection objectives, in light of Article 168 TFEU. Nonetheless, it was also queried. The purpose of this section is to address the question of whether, in the context of this "new look" at Article 34, it may have been necessary to reinforce the criterion of 'inherency' to safeguard the efficiency of the internal market, especially vis-à-vis price control rules.

It may be recalled from section 3.1 that at the core of the approach adopted in *Torfaen* had been the requirement for prima facie restrictive domestic measures not to adversely affect the flow of interstate trade more than was necessary for the achievement of their stated goals. This problem is, however, not unique to the interpretation of the EU rules on freedom of movement, but has also been addressed in the context of EU competition law: in cases such as *Wouters* and *Meca Medina* the Court of Justice, retreating from a hitherto wide interpretation of the prohibition of anti-competitive arrangements, contained in Article 101(1), had excluded from the remit of this provision arrangements which restricted the freedom to trade of the parties to, inter alia, achieve public interest goals that justified adopting regulatory measures applicable to certain economic activities,[87] if the prima facie restrictive arrangement addressed demands of public interest and did not restrict the freedom to compete on the market more than was necessary to achieve its stated objectives.[88]

It is acknowledged that the approach discussed so far, to the extent that it had been motivated, at least in part, by a concern for ensuring a more "economics-based" interpretation of the competition rules, may not be fully transposed to the scrutiny of state measures having a prima facie discriminatory impact on imports in light of the free movement rules.[89] Nonetheless, it is submitted that there may be a powerful argument in favour of extending some of its elements to the way in which Article 34 TFEU should be read. In general, it must observed that both the free movement principles and the competition rules pursue the same overarching objective, i.e. the creation of a well-functioning internal market and have faced the same challenge of having to reconcile the attainment of the market integration imperative with other, often non-economic objectives.[90]

It is acknowledged that in the context of competition law the notion of "state-action defence" has sought to respond to this challenge, to the extent that it has sought to limit the scope of the EU competition law to exclude prima facie anti-competitive conduct which is not the outcome of an independent decision on the part of the undertakings concerned, on the ground of being required under a genuinely regulatory scheme, and which does not restrict completely the ability of the affected firms to compete on the market.[91] Nonetheless, it is argued that, to the extent that

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[87] See case C-309/99, Wouters, [2002] ECR I-1577; also case C-519/04, Meca-Medina and Majcen v Commission, [2006] ECR I-6991.

[88] Wouters, cit. (fn. 94), para. 97; see also Meca Medina, cit. (fn. 109), para. 40-45. For commentary see e.g. Jones, "Analysis of agreements under the US and EC antitrust law: convergence or divergence", (2006) 51(4) Ant Bull 691, esp. pp. 740 ff.

[89] Monti, "Article 81 EC and public policy", (2002) 39(5) CMLRev 1057 at 1060.

[90] Id., p. 1062-1063; see also Mortelmans, "Toward convergence in the application of the rules on free movement and on competition?", (2001) 38(3) CMLRev 613 at 618-19.

[91] See inter alia joined cases C-359/95 P and 379/95 P, Commission v Ladbroke racing Ltd, [1997] ECR I-6265, especially para. 31 ff; also, Case C-198/01, CIF, [2003] ECR I-430, para. 50-51; see also para. 58-60. For commentary see e.g. Temple Lang, "National measures restricting competition and national authorities under

both the "Mandatory Requirements" doctrine and the "more economics-based approach" to Article 101(1) outlined above are inspired by broader principles of reasonableness and of proportionality, it is justified to propose that the latter may contribute to the development of a more "scrupulous" reading of the test enshrined, in the context of Article 34, by the EU Court of Justice in the *Torfaen* judgment.[92]

It is suggested that those national rules that interfere, actually or potentially, with the pattern of inter-state trade only "incidentally", on the ground of pursuing a genuine public interest objective should not be regarded as falling within the remit of the freedom of movement of goods' rule if two conditions are met. First of all, it must be shown that these rules are clearly "appropriate" to secure a specific public policy goal, the attainment of which is left by the TFEU to the national authorities (as is the case with public health protection, in accordance with Article 168 TFEU): in this context it is also indispensable to consider how wide the margin of appreciation enjoyed by the national authorities is, in light of the TFEU provisions.[93] And second, it must be established that they interfere with interstate trade only to the extent that it is 'strictly necessary' to attain a specific public policy objective—in other words, that no 'as effective' alternative policy tool exist that is less "offensive" of the freedom of movement principles.[94]

It can therefore be concluded that reconciling the achievement of the internal market goals within the framework of conferred competences enshrined in the TFEU is a very complex question to which Article 34 TFEU cannot give a full answer. Especially when, as a result of domestic regulatory intervention affecting certain economic activities, assessing the function and the impact of that intervention on market entry and expansion, especially of producers of imported goods proves inevitably complex,[95] the demands of the principle of conferral could prompt the question whether it may be justifiable to assign to the goal of market integration a "pre-eminent" role vis-à-vis other equally important public interest objectives, in respect of which the member states are recognised as being "sovereign".[96]

The forgoing analysis has suggested that it may indeed be possible to read Article 34 TFEU in a more "discerning" way and to incorporate in its interpretation issues of competence. In this context, recourse to a "sharper" concept of 'inherency', elaborated in light of the competition law judgments in *Meca Medina* and *Wouters*, might ensure that only "strictly proportionate" restrictions on the freedom to trade, imposed for genuine public policy reasons, would be allowed to avoid the consequences of an infringement of the freedom of movement principles.[97] Nonetheless, this is by no means the only approach that could potentially be adopted to fulfil this objective. The next section will briefly explore the way in which the Canadian courts have addressed similar questions arising from the apparent "tension" between attaining open and rivalrous markets, through the application of the federal competition rules, if necessary by restraining the freedom to trade and compete in certain industries for public interest reasons.

Article 10 EC", (2004) 29(3) ELRev 396 at 402-403; also mutatis mutandis, Rizza, "The duty of national competition authorities to disapply anti-competitive domestic legislation", (2004) 25(2) ECLR 126 at 129-130.

[92] See, mutatis mutandis, inter alia Monti, "Article 81 and public policy", (2002) 39(5) CMLRev 1057, pp. 1086-1088; see also Mortelmans, cit. (fn. 98), p. 637.

[93] See e.g. mutatis mutandis, case C-333/14, para. 37-38.

[94] See inter alia, mutatis mutandis, case C-145/88, cit. (fn. 73), para. 14; also, mutatis mutandis, Meca Medina, cit. (fn. 109), para. 43-44.

[95] See e.g. Prechal, "Competence creep and general principles of EU law", (2010) 3(1) Rev of Eur Admin Law 5, pp. 6-7. See also Ladbroke, cit. (fn. 186), para. 33. See also mutatis mutandis, case 249/81, Commission v Ireland (Re: Buy Irish), [1982] ECR 4005, especially para. 23-25; joined cases 209-215 and 218/78, Stichting Sygarretten v Commission, [1980] ECR 3125, especially paras. 24-29.

[96] Case C-333/14, para. 37-38.

[97] See inter alia, mutatis mutandis, case C-145/88, cit. (fn. 73), para. 14; also, mutatis mutandis, Meca Medina, cit. (fn. 109), para. 43-44.

3.3. Tales from across the Atlantic: alcohol control and minimum pricing rules in provincial Canada—between securing competitive markets and maintaining local regulatory integrity

The previous sections analysed the current approach to the interpretation of Article 34 in cases involving price control rules and argued that the renewed commitment, resulting from the Treaty of Lisbon, to observing the principles underscoring the exercise of Union competences could justify moving toward a more restrictive interpretation of Article 34 TFEU as a result of which domestic rules adopted to foster genuine regulatory objectives in areas where the member states retain the competence to act, could be found to fall outside the scope of that provision, subject to a close assessment of their "appropriateness" and "necessity".

The purpose of this section will be to consider whether further insights as to how such a "selective approach" to Article 34 TFEU could be constructed may be gleaned from the experience of a foreign jurisdiction where the freedom to compete on grounds of price in the alcoholic beverages' industry has been significantly constrained by local regulation, namely Canada. It is certainly acknowledged that the EU is not comparable to a fully-fledged federal state, where clear boundaries exist as between the powers conferred to the central authorities and those belonging to "local" authorities".[98] Nonetheless, it is reminded that the EU, being an organisation governed by the principle of conferral, can only act in those areas in which it enjoys the power of doing so and to this end must comply with the principles of conferral and subsidiarity, so as not to impair the integrity of regulatory prerogatives that the member states maintain, in light of the Treaty.[99] Accordingly, it is argued that respecting the way in which power is allocated at "different levels" in a multi-layered governmental structure is a concern that is common to both the EU, as a "sui generis" international legal order, and to a sovereign state that is characterised by having a federal structure. It is therefore suggested that an examination of the Canadian response to these question especially in respect of the compatibility of provincial rules affecting the supply and retail of alcoholic beverages with federal competition law could prove helpful for the purpose of developing an alternative, more discerning approach to Article 34 TFEU in a case such as the *SWA* challenge.

The limited remit of this article does not allow for an in-depth examination of the complex issues arising from the interplay between federal legislation and provincial enactments in light of Canadian constitutional law. Suffice to say in this respect that section 92 of the Constitutional Act of Canada safeguards the power of the provincial assemblies to regulate, among other matters, "property and civil rights", including commercial matters enjoying local significance.[100] Section 91, by contrast, accords to the Federal Parliament the prerogative to enact legislation effective across the whole of Canada which is designed to regulate issues that enjoy a significance going beyond the confines of an individual province.[101] Thus, while the provincial assemblies could enact rules designed to govern commercial matters having a provincial remit, such as the trade in securities within an individual Province,[102] "the incorporation (…), the powers of companies" and the "limitations" to which the latter should be subjected were matters for federal legislation,[103] on the ground that they would have an impact on "trade and commerce" throughout Canada.[104]

There are cases, however, where the boundary between "local" and "nation-wide" competences is not immediately obvious. In the same *McCutcheon* decision it was expressly acknowledged that there may be issues that, by their very nature are amenable to being regulated

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[98] See e.g., generally, inter alia, Walton, "Paramountcy: a distinctly Canadian solution", (2004) 15 Nat'l J Const'l L 335, especially pp. 351-353.

[99] See e.g., mutatis mutandis, case C-157/99, Geraets-Smits et al., [2001] ECR I-5473, para. 44-45. Supra, section 3.2.

[100] See inter alia Multiple Access Ltd v McCutcheon, [1982] 2 SCR 161, para. 15.

[101] See e.g. id., para. 17.

[102] Id., para. 15-16.

[103] Id., par. 17.

[104] Id., para. 19; see also para. 21-22.

by both the federal parliament and by the provincial assemblies.[105] As was aptly put by Dickson J, "(…) when (…) the corporate-security federal and provincial characteristics of the insider trading legislation are roughly equal in importance there would seem little reason, when considering validity, to kill one and let the other live. (…)"[106]

Consequently, a question emerges as to how to resolve conflicts arising from the exercise of these prima facie concurrent powers. If in a specific case a "real operational conflict" was found between provincial and federal legislation--i.e. "(…) it [would be] impossible to comply simultaneously with both provincial and federal enactments (…)"[107]—which enactment would prevail? In, inter alia, the *Rothmans et al.* judgment it was held that in a similar situation the application of the federal statute would displace that of the provincial provisions to prevent "inconsistent local legislation" from jeopardising the federal Parliament's objectives,[108] so as to maintain the unity and consistency of the interpretation and application of Canadian federal statutes.[109] Nonetheless, it is legitimate to query whether this principle of "paramountcy" finds any limits as regards its scope of application, so as to allow the provincial assemblies to exercise their regulatory powers in order to meet "local" public interest needs.[110] This question is central to the interaction existing between the competition rules, enshrined in the Competition Act 2009 and having effect throughout the Canadian federation, and the provisions that the provincial assemblies have adopted to discipline certain forms of commerce, such as the alcohol trade.

At the outset, it should be noted that "liquor control" has consistently fallen within the remit of the provincial assemblies' normative powers, on the ground of being a "local matter": with the notable exception of Alberta,[111] however, there is a common trait characterising the substance of these regulatory interventions, namely that in all provinces the sale of alcoholic beverages has been subjected to very pervasive and wide-ranging restrictions. These restraints have encompassed the creation of public monopolies on the wholesale commerce of liquor, the imposition of advertising and retail trade requirements and the imposition of price controls.[112]

It may be queried how such an "intrusive" regulatory framework can be reconciled with the federal competition rules. In general, according to the Canadian Competition Act serious infringements such as price-fixing or bid rigging attract criminal liability.[113] Other, less serious competition law breaches instead are regarded as being "reviewable matters" and lead, after an investigation by the Competition Bureau, to the imposition of financial penalties, for which the Competition Tribunal is competent.[114] It is also emphasised that unlike in US antitrust law, there is no sharp distinction between 'per se' and 'rule of reason' infringements, but that the relevant legal

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[105] Id., para. 28-29.
[106] Id., para. 30.
[107] Rothmans, Benson & Hedges Ltd v Saskatchewan, [2005] 1 SCR 188, para. 11.
[108] Id., para. 13-14.
[109] Id., para.
[110] See inter alia R v Cherry, [1938] 1 DLR 156, para. 9; see also para. 12-14. For commentary, see inter alia Walton, "Paramountcy: a distinctly Canadian solution", (2004) 15 Nat'l J Const'l L 335, especially pp. 351-353.
[111] See e.g. Flannigan et al. (2003), *Sobering Results*, available at: http://s3-us-west-2.amazonaws.com/parkland-research-pdfs/soberingresult.pdf.
[112] See e.g.: http://www.lcbo.com/content/lcbo/en/corporate-pages/about.html#.VuWapsvctdg; also Ontario Regulation 116/10, available at: https://www.ontario.ca/laws/regulation/100116. For commentary see inter alia Masson and Sen, "Uncorking a strange brew", Commentary No 414, (2014) CD Howe Institute, available as online paper ISSN 1703-0765, especially pp. 4-7; Malleck, *Try to control yourself: the prohibition of public drinking in post-Prohibition Ontario*, 2012: Vancouver, UBC Press (hereinafter referred to as Malleck), pp. 211-213.
[113] See inter alia R v Nova Scotia Pharmaceutical Society, [1992] SCR 606, para. 107-108; see also Weidmann v Shragge, [1912] SCJ No 6; [1912] 21 WLR 717, e.g. per Idlington J, para. 10. For commentary, see inter alia Trebilcock et al., The Law and Economics of Canadian competition policy, 2003: Toronto, University of Toronto Press, pp. 23-25.
[114] Trebilcock, cit. (fn. 134), pp. 25-28; see also pp. 755-757.

standard can be found to lie "on a continuum" between these two approaches, having close regard to the definition and the characteristics of the relevant market and to the nature of each practice. [115] Having regard more specifically to minimum pricing, thanks to the 2009 reforms Canadian competition law regards these arrangements, including resale price maintenance, as a "reviewable matter", [116] which will therefore attract financial sanctions if the Competition Tribunal can be satisfied that these arrangements, on the balance of probabilities, could distort competition wither by facilitating coordination among the concerned parties or by preventing rivals from entering in or expanding on the relevant market. [117]

Against this background it can be suggested that in Canada a complex and multi-layered structure exists for the regulation of the economy, with the federal authorities being responsible for governing trade and commerce on a nation-wide basis and the provincial assemblies remaining empowered, in accordance with the constitutional rules governing the allocation of legislative powers, to regiment certain sectors of the economy "on a provincial basis", i.e. to address local needs which they are recognised as being best placed to assess and act upon. [118] In this context, it may be legitimately queried whether the scope of the principle of paramountcy should be influenced by the concern for upholding the integrity of the regulatory powers that the provinces continue to enjoy, in light of Article 92 of the Constitution Act, even when the exercise thereof can lead to the flow of trade across the Canadian federation being limited.

In general, the Supreme Court of Canada recognised the legitimacy of federal competition legislation as a means of regulating trade and commerce through both the threat of criminal sanctions and the provision of civil remedies, ranging from cease-and-desist orders to damages liability for infringers, [119] on the ground of it being "(…) an example of the *genre* of legislation that could not practically or constitutionally be enacted by a provincial government (…)": in its view, since "(…) Canada is, for economic purposes, a single huge marketplace (…) competition (…) must be regulated federally. (…)" [120] A question, therefore, emerges as to the extent to which, thanks to the principle of paramountcy, the enforcement of the competition rules may in any way impact on the power of the provincial assemblies to regulate "purely provincial matters" and in that context, "local" issues affecting rights or obligations within their territorial jurisdiction, [121] including intra-provincial trade. [122]

In *R v Simoneau* it was held that conduct aimed at complying with regulatory obligations imposed by provincial assemblies would remain immune from the applicability of federal legislation, including the Competition Act [123] and therefore did not attract antitrust liability, so long as these prima facie anti-competitive practices conformed to local regulation and pursued a genuine public policy goal in the interest of that industry and of society at large, as determined by the provincial legislature in accordance with the powers conferred to it by the Constitution. [124]

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[115] Atlantic Sugar Refineries Co Ltd v Canada, [1980], see e.g. per Estey J, para. 51; also para. 90-91; see also Nova Scotia, cit. (fn. 134), para. 99-103; see also para. 107-108. For commentary see e.g. Famula, "Section 45 of the Competition Act: partial rule of reason or partially reasonable rule?", (1999) 12, pp. 134-135.

[116] See Section 76, Competition Act of Canada.

[117] Commissioner for Competition v Visa Canada Corp, [2013] Comp Trib 10, para. 129; see also para. 162-163, 269. For commentary, see also Competition Bureau, Enforcement guidelines: Price maintenance, 15 September 2014, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03787.html, para. 2.1.2-2.1.4; also para. 5.3.

[118] See e.g. Rocois Construction Inc v Quebec Ready Mix, [1985] 2 FC 40, per McGuigan J, para. 22-26; see also para. 27 and 31; also McCutcheon, cit. (fn. 153), p. 191.

[119] Inter alia, Rocois, loc. ult. cit..

[120] Id., para. 26.

[121] See inter alia R v Cherry, [1938] 1 DLR 156, e.g. para. 7, 10-12.

[122] R v Simoneau, [1936] 1 DLR 143, para. 11-12; see also para. 7 and 31-33.

[123] Id., para. 23-24; see also para. 28-29 and 33. See also R v Cherry, [1938] 1 DLR 156, para. 9; see also para. 12.

[124] R v Cherry, cit. (fn. 133), para. 9; see also para. 12-14.

The forgoing analysis illustrates that the Canadian Courts have constructed a legal justification—namely the Regulated Conduct Defence (RCD)—to "immunise" from the consequences of a finding of a competition infringement prima facie restrictive behaviour, on the basis of the application of the constitutional rules aimed at protecting the integrity of Provincial legislative prerogatives vis-à-vis the overarching power to legislate for the whole Federal jurisdiction enjoyed by the Parliament in Ottawa. It is suggested that the RCD, to the extent that it limits the scope of application of the Competition Act vis-à-vis genuinely "regulated conduct", serves the function of counterbalancing the demands of the effective enforcement of federal antitrust rules with the integrity of the constitutional prerogatives enjoyed by the provincial assemblies in light of Section 92 of the Constitution Act.

In earlier case law the defence was read relatively generously as "immunising" from competition liability not just conduct that was mandated by provincial regulation, but also practices that were simply permissible under it,[125] on the ground that arrangements compliant with provincial statutes could not be said to "operate to the detriment of or against the interest of the public".[126] Over time, however, concerns were raised that this generous reading of the RCD would have hampered the effective enforcement of the Competition Act, especially in regulated industries.[127] Thus, in *Waterloo Law Association v Canada* the Supreme Court of Canada held that 'regulated conduct' could avoid a criminal sanction only if it was "required" by a "governing body" acting in accordance with powers delegated to it by a provincial statute.[128] Consequently, a common "regulated fee schedule" agreed upon by practising lawyers who were members of the organisation, could not be "immunised" from competition scrutiny,[129] since nowhere had the provincial statute conferred on the governing body of the legal profession in Ontario the power to set and enforce a common fee scale among its members.[130] Absent any recognition of the practice required nor allowed under the relevant professional regulatory scheme,[131] regulated professionals such as lawyers, could not be immune from antitrust liability.[132]

It is suggested, in light of the forgoing, that the current reading of the regulated conduct defence responds to overarching concerns for achieving a "stable equilibrium between federal and provincial jurisdiction" and in this context to rebalance the relationship between sector regulation, which is often a "local matter", and the application of the federal competition statutes.[133] Thus, on the basis of a "functional" reading of the Competition Act and the provincial legislation, only conduct that is "necessarily incidental to the industry (or profession)" would be "immunised" by the regulated conduct defence.[134] Behaviour that is merely "fortuitously or coincidentally connected" with the exercise of regulated trades would instead be caught by the competition rules.[135]

In light of the above analysis, it may be queried to what extent the RCD has had any impact on the competition law scrutiny of liquor control rules, including those restricting the freedom to set prices. This general question was considered by the Supreme Court in the *Canadian Breweries* decision, which concerned a merger between beer producers leading to the increase in market

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[125] Simoneau, cit. (fn. 132), para. 37-40.
[126] Id., para. 54; see also Attorney General of Canada and another v Jabour and another, [1982] 2 SCR 307, para. 93-94; see also para. 61-63.
[127] Competition Bureau, Technical Bulletin: regulated conduct, issued on 27 September 2010, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03273.html, para. 2, text to fn. 19-20.
[128] [1986] 58 OR (2d) 27, para. 4-5. See also para. 13.
[129] Id., para. 21.
[130] Id., para. 29.
[131] Ibid.; see also para. 30.
[132] Id., para. 20.
[133] Trebilcock, "Regulated conduct and the Competition Act", (2005) Commentaries 492, p. 495.
[134] Id., p. 496.
[135] Ibid. See also Competition Bureau, cit. (fn. 182), sect. 4; Duggan et al. "Regulated conduct and the Competition Act", (2005) 41 Can Bus L J 492, especially section 2.

concentration within that industry.[136] The prosecution had alleged that the merger, being part of a strategy designed to earn the defendants significant market power with a view to setting supra-competitive prices had infringed the competition rules. [137] In defence it was claimed that the arrangement could not be deemed to be injurious to competition on the ground that it affected a market that was highly regulated:[138] consequently it could be presumed that the regulator would be acting in the public interest and in particular would ensure that price competition would not be unduly impaired, even within the constraints of the relevant regulatory framework.[139]

The Supreme Court of Ontario observed that the parties had agreed to the merger as a response to the challenges arising from the relaxation of the rules governing alcohol sales in the Province[140] and that the concentration had not led to the creation of a position of monopoly[141] or to an impairment of rivalry.[142] The parties, however, were clearly constrained by the legislative framework for the control of the supply and consumption of liquor, as a result of which they could not outbid each other on price.[143] Accordingly, the Court held that the question of whether the merger resulted in an "undue" restriction of competition should have been addressed in light of the features of the industry[144] and in particular of the nature of the legislative framework concerning alcohol supply and sales and in particular of the extent to which provincial legislation had "removed" alcohol, whether partially or totally from the "competitive field". [145]

The Court observed that Ontario liquor control legislation placed significant restraints on the trade of alcoholic beverages and conferred to the Liquor Control Board the power to regulate liquor retail prices.[146] Thus, it took the view that the merger could not have unduly restricted price competition, as alleged by the prosecution, either on its own or via the "collateral agreements" that the merged entity had stipulated with its rivals: it was held since the relevant prices had already been determined by the LCBO[147] and to the extent that the "agreements" were nothing more than a commitment to the price that the Board had already determined, they could not have infringed the competition rules.[148] Unless it could have been demonstrated that the "Board's own prices" had been set at a level or in a manner that was detrimental to the public interest, for instance because it had been proven that the Board had been subjected to undue influence and therefore had acted beyond the public interest, neither the merger nor the "collateral agreements" could be regarded as attracting antitrust liability.[149]

The *Canadian Breweries* decision played a decisive role in indicating how the courts would approach the issue of the legality, in light of the federal competition rules, of the restrains on the freedom to trade and compete (especially on grounds of price) that provincial liquor control regulation imposed on the affected undertakings.[150] It is argued that if it could be shown that the practices mandated as a result of provincial regulatory measures were "genuinely necessary" to attain the stated regulatory objectives, in the sense of being both "well-suited" and "co-essential" to

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[136] R v Canadian Breweries Ltd, [1960] OR 601.
[137] Id., para. 14; see also para. 18-20.
[138] Id., para. 37.
[139] Id., see para. 60-62.
[140] Id., para. 14-16.
[141] Id., para. 32-35.
[142] Id., para. 36.
[143] Ibid.; see also para. 38 and 41.
[144] Id., para. 41; see also para. 37.
[145] Id., para. 39-41.
[146] I.d, para. 53-55; see also para. 57.
[147] Id., para. 65.
[148] Ibid.
[149] Id., para. 73; see also para. 99.
[150] Ibid.; see also, mutatis mutandis, Alberta Liquor Stores Assn. v Alberta, [2008] ABQB 595, para. 2; see also para. 100-103.

their accomplishment, they would have been regarded as falling within the remit of the RCD. [151] For this purpose, it would be indispensable to assess to what extent the arrangements in question, including those resulting in a restriction of price competition, were consistent with the regulatory obligations resulting from the provincial enactments and whether they restricted competition more than was objectively necessary to achieve the public policy objectives they pursued.[152]

Against this background it is submitted that commercial practices that comply with statutory obligations to set prices above a specified minimum are likely to benefit from the application of the RCD and therefore remain immune from antitrust liability: unless it could be shown that these prices had been determined in a way that "circumvented" the regulator's functions —either, e.g. because it restricted competition on other grounds or that the regulator itself, in setting those prices, had acted outside the remit of its statutory responsibilities--[153] the arrangements that complied with the statutory minimum would represent "regulatory conduct" immune from antitrust liability. [154]

In light of the forgoing analysis, it may be concluded that the Canadian courts' approach to the complex interplay existing between the exercise at a "local" level of legitimate regulatory powers and the effective competition enforcement at federal level offers a very fitting example of how the scope of the "free market principles" can be shaped to reflect the impact of the rules governing the allocation of competence at different levels of government in a complex constitutional and institutional framework. It is acknowledged that the RCD cannot be transplanted into EU law, due to the inevitable diversity of the Union, as a sui generis, multi-layered international polity, vis-à-vis Canada, which is instead a fully-fledged federal state. However, it is legitimate to ask whether any elements of the Canadian acquis in this area can contribute to the "reshaping" of the scope of Article 34 TFEU in a way that reflects the demands of the principle of conferral and its influence on the future attainment of the internal market goals. This question will be addressed in the next section.

3.4. Restrictions on imports or "regulated conduct"? Canadian lessons for Article 34 TFEU

Reconciling the right to regulate specific economic activities that the member states enjoy in accordance with the TFEU and the obligations that the Treaty itself imposes on national and EU authorities with a view to achieving the internal market objectives has been a vexed question that has shaped the remit of Article 34 TFEU as well as its relationship with the "public policy justification" enshrined in Article 36. Taking as its starting point the challenge brought by the SWA against Scottish minimum alcohol pricing legislation, section 2 had shown how the Court of Justice of the EU has consistently championed the goal of market integration and, for that purpose, has upheld the role of price competition in virtually all cases in which the member states had sought to influence the freedom of traders to "charge as low as possible" for their commodities. However, it was queried whether it may be justified in all cases to resort to such a wide reading of Article 34, especially when its application "straddled" in policy areas in respect of which, in light of the TFEU,

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[151] See inter alia Jankitsch, "From monopoly to competition in telecommunications", (1994) 23 Can Bus L J 239, see sect. 5; see also Competition Bureau, cit. (fn. 182), p. 4. See also, inter alia, mutatis mutandis, Rogers Communications Ltd v Shaw Communications Ltd, [2009] 63 BLR (4th) 102, para. 63-64.

[152] Canadian Breweries, cit. (fn. 141), para. 65; see also Competition Bureau, loc. ult. cit. For commentary on minimum pricing in Canada, see e.g. Manning et al., "The demand for alcohol: the differential response to price", (1995) 14 J of Health econ 123, p.135-137; see also, e.g. (based on UK Household survey data) Meier et al., "Policy options for alcohol price regulation", (2010) 105(3) Addiction 383 at 383-385. Also, see e.g. Stockwell et al., "Does minimum pricing reduce alcohol consumption? The experience of a Canadian province", (2011) 107 Addiction 912, see e.g. p. 913-14; also Black et al., "The price of a drink", (2010) 106 Addiction 729; also Brennan et al., "Beneficial effects of minimum unit pricing for alcohol versus a ban on below cost selling", (2014) BMJ 349, see e.g. p. 355.

[153] See Canadian Breweries, cit. (fn. 180), para. 73, 99.

[154] R v Canadian Breweries Ltd, [1960] OR 601, para. 73; see also para. 99. See also, inter alia, Alberta Liquor Stores Assn. v Alberta, [2008] ABQB 595, para. 2; see also para. 100-103. For commentary, see inter alia Trebilcock, cit. (fn. 143), p. 494.

the member states enjoy a wide margin of appreciation. Thus, it was suggested that there may be alternative solutions that can be designed to ensure that the continuing concern for market access through price competition can appropriately be counterbalanced against the demands arising from the observance of higher rules concerning the allocation of competences to different levels of government.

The purpose of this section will be to consider how this "alternative" view of Article 34 could "look like", kin light of the possible alternatives discussed so far. It must be acknowledged, as a preliminary point, that it is not possible to "transplant" either the EU antitrust law approach to questions of 'necessity' of a prima facie restriction on competition. Nonetheless, it is submitted that seeking to draw inferences from these approaches in order to explore how a more "selective" reading of Article 34 could look like if it was influenced by the application of Article 5 and, as far as the Scottish minimum alcohol pricing legislation was concerned, of Article 168 TFEU would be an appropriate response to this question, so long as its application entails a careful assessment of whether national regulatory measures are genuinely consistent with the need to attain certain, clearly identified public policy goals whose attainment belongs to the member states and entail no greater restrictions on the freedom to trade than was required to achieve these objectives. First of all, it should be noted that the principle of conferral constitutes an over-arching rule of EU law, whose application affects all forms of Union action, including the way in which the EU Court of Justice interprets the internal market rules. Second, it is observed that, as the Court of Justice itself recognised in its CIF judgment, price competition "(…) does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be given (…)".[155]

It is therefore argued that national restraints on the freedom to trade within the single market can—and given the importance of the principle of conferral, perhaps should—be appraised in light of common principles and of a common approach, regardless of the aspect of competition on which they had an impact. Although it is acknowledged that the respect for the principle of non-discrimination, which forms the basis for the current EU acquis concerning, among others, minimum pricing, it is submitted that the careful analysis of the "appropriateness" and "inherency" of the national rules in issue in each case would ensure that the scope of the internal market principles and in particular of Article 34 TFEU is not unduly restricted.

It is consequently suggested that if national regulatory measures adopted by the member states in areas in which they enjoy a margin of discretion are "well-suited" to the achievement of the specific public policy objectives being engaged and so long as competition "(…) even if limited, (…) may operate through other factors"[156] they could be regarded as representing a legitimate exercise of domestic regulatory prerogatives.[157] It is submitted in this specific respect, that, if both of the proposed criteria are fulfilled, access to the market for imported goods would only be restricted "incidentally", that is to the extent that is required to satisfy the public interest demands being pursued not be completely precluded, and partially, on the ground that the latter could still "threaten" domestic commodities on the strength of, inter alia, their "quality" or "image".[158]

It is added that the examination of the Canadian Regulated Conduct Defence provides more support to this approach, since it does not only show that it is possible to balance broader concerns for open, competitive markets against the need to safeguard local regulatory prerogatives.[159] It also demonstrates that these considerations can come into play in order to shape the scope of the competition rules so that their scope does not stretch as far as to de facto impair the remit and intensity of regulatory powers enjoyed by other public authorities on the basis of the relevant

[155] See case C-198/01, CIF, cit. (fn. 119), para. 68.
[156] Id., para. 69.
[157] See e.g., mutatis mutandis, case 13/77, SA GB-INNO, [1977] ECR 2115, para. 13-14, 17; see also para. 41; also inter alia case C-145/88, Torfaen, cit. (fn. 73), para.14; see also, mutatis mutandis, Ladbroke, cit. (fn. 118), para. 34; Wouters, cit. (fn. 109), para. 99-100..
[158] See e.g., mutatis mutandis, Horsley, cit. (fn. 65), pp. 752.
[159] See inter alia R v Canadian Breweries Ltd, [1960] OR 601, e.g. para. 18-21, 73, 98-99.

competence rules,[160] by outlawing practices that are "necessarily incidental to the industry (or profession)" and are consequently "allowed" or "compelled" as part of a comprehensive regulatory scheme, laid out by provincial legislatures in the exercise of their constitutional prerogatives.[161]

In light of the above analysis, it may be asked whether the above discussion could have affected in any way the manner in which Article 34 was applied in the SWA case. It is reminded that in the preliminary ruling the Scottish authorities had been recognised as enjoying significant, broad discretion as to the assessment of local health demands and as to the determination of the "policy response" thereto.[162] It is acknowledged in this respect that this conclusion had been reached by the Court in the context of the application of Article 36, and thus after a rather "swift" and unsurprising finding that Article 34 TFEU had been infringed. Nonetheless, it is argued that, had the Court of Justice recognised the relevance of the principle of conferral vis-à-vis its interpretation of the internal market rules, it could have reached the conclusion that the minimum alcohol pricing rules had fallen outside the remit of Article 34 subject to the 'inherency' appraisal proposed earlier: if it could have been shown that the minimum pricing rules left the undertakings affected by their application free to compete on other grounds, such as quality or product image[163] and were comparably more effective than other policy tools vis-à-vis attainment their stated harm-reduction goals,[164] the referring court could have concluded that they had represented the expression of the legitimate exercise of regulatory powers enjoyed by the competent national authorities—i.e. the Scottish Government.

It can therefore be concluded that reconciling the achievement of the internal market goals within the framework of conferred competences enshrined in the TFEU is a very complex question to which Article 34 TFEU cannot give a full answer. This is, however, not an impossible task: recourse to established approaches to the interpretation of this provision, enshrined in EU law or in the law of other jurisdictions, could re-balance these concomitant, if not prima facie mutually opposing, concerns and thus ensure that the EU internal market remains a truly "shared regulatory space" whose functioning must comply at all times with the principle of conferral.

4. National public interest regulation in the EU internal market: making a case for a new Article 34? Tentative conclusions…

Striking a balance between the integrity of the EU single market and the legitimate "right to regulate" enjoyed by the member states in areas where, in accordance with the Founding Treaties, they retain competence to act alongside the Union itself has been extremely challenging throughout the history of European integration. This contribution has argued that since the principles of conferral and subsidiarity are central to the Union's normative and institutional architecture and therefore are binding on all its institutions, including the CJEU, time may be mature for reflecting the shared nature of the competence that the Union and the member states enjoy vis-à-vis the

[160] See e.g. R v Simoneau, [1936] 1 DLR 143, para. 11-12; see also para. 7, 23-24.

[161] See inter alia Waterloo Law Association, cit. (fn. 138), para. 28-29; see e.g. Competition Bureau, Technical Bulletin: regulated conduct, issued on 27 September 2010, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03273.html, p. 4; see also, among others, R v Charterways, (1981) 32 OR (2nd) 719, para. 54-57; see also para. 62. For commentary, see inter alia Trebilcock, cit. (fn. 143), p. 496.

[162] Case C-333/14, cit. (fn. 2), para. 37-38; for commentary, see mutatis mutandis, Temple Lang, "EC Competition law and member state action", (1989-90) 10 Nw J Int'l L Bus 114, pp. 125-126.

[163] See e.g., mutatis mutandis, case 13/77, SA GB-INNO, [1977] ECR 2115, para. 13-14, 17; see also para. 41; also inter alia Torfaen, cit. (fn.), para. 12-13; see also Ladbroke, cit. (fn. 185), para. 34; Wouters, cit. (fn.), para. 99-100..

[164] See e.g. (based on UK Household survey data) Meier et al., "Policy options for alcohol price regulation", (2010) 105(3) Addiction 383, especially pp. 384-385; see also Manning et al., "The demand for alcohol: the differential response to price", (1995) 14 J of Health Econ 123, especially pp. 135-137.

achievement of the internal market objectives in the way in which we interpret the free movement of goods' provisions.

Relying on the analysis of the 2015 SWA preliminary ruling as a clear example of this interaction, it was argued that while this decision had been consistent with existing precedent, it had not considered whether the minimum unit pricing rules could have been deemed to fall outside the remit of the free movement rules on the ground of being the expression of legitimate regulatory prerogatives in the area of public health protection. On this basis, more general questions concerning the nature of the competences enjoyed by the EU and the member states in the area of public health protection were examined. It was argued that the commitment to the principle of conferral could provide a convincing argument in favour of incorporating considerations linked to the allocation of powers at Union and national level into the way in which Article 34 TFEU is read, especially in respect of domestic measures that, while incidentally affecting the flow of interstate trade, seek to achieve "internal demands" of public policy in respect of which the national authorities retain significant powers of appreciation. It was added that the over-arching nature of this principle and its importance in the overall scheme of the Treaties would justify applying such a more "discerning" reading of the freedom of movement of goods' rule even to cases such as the SWA litigation, where what is at issue is the attempt of national authorities to restrict the right of traders to decide "how high or how low" to price certain goods in order to meet certain public interest demands.

This article examined a number of alternative "takes" vis-à-vis the current interpretation of Article 34 TFEU, ranging from the internal market-based "mandatory requirements" doctrine to the EU competition law concept of state action defence, to the "exotic" response given by the Canadian federal and provincial courts to similar concerns, i.e. the "regulated conduct defence". It was argued that while none of the above approaches can be fully "transplanted" to dealing with internal market issues, they can be read as indicating that it is possible to develop a framework for assessment that reflects in the way in which the remit of the internal market rules is determined the demands of the principle of conferral. For this purpose, it was proposed in section 3.3 that once it had been established that the member states had acted in areas in respect to which they were competent, the measures in issue could have been deemed to fall outside the scope of Article 34 TFEU subject to an assessment of their "appropriateness" vis-à-vis their stated objective and their "inherency" to its attainment—in other words, of whether the imposition of these regulatory limits left intact the possibility to compete on grounds other than those affected by the regulatory measures in issue.

In light of the forgoing, it may be queried "where we stand" when it comes to the internal market scrutiny of national measures such as the 2012 Scottish minimum alcohol pricing rules, whose nature is "purely regulatory" and whose interstate trade impact is instead merely incidental. It is submitted that the Court's decision should be welcomed to the extent that it makes clear that minimum pricing rules represent an "appropriate" regulatory tool to deal with the public health needs and demands of local populations as well as recognising that it is for the member states to assess the nature of these demands and to decide how to address them. However, it is regrettable that the CJEU, by relying on the abstract notion of "hindrance to market access", concluded perhaps too swiftly that the minimum alcohol pricing rules had infringed Article 34. It is acknowledged that any interference with the freedom to set prices and to compete on this ground should be carefully assessed. Nonetheless, it is submitted that the observance of Article 168 could have justified addressing the more general issue of whether the nature of the powers enjoyed respectively by the EU and the member states in this area could have had any bearing on the appraisal of national measures that affect this aspect of rivalry in light of Article 34 TFEU. It is therefore hoped that the Court will come to draw clearer boundaries between permissible and impermissible restraints on the freedom of movement rights so as to safeguard the regulatory powers that the Treaty expressly leaves to national authorities, without losing sight of the integrationist goal at the core of the EU Treaties.[165]

[165] Horsley, cit. (fn. 65), p. 753.